



DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Parts 1005 and 1007

[Doc. No. AMS-DA-09-0001; AO-388-A17 and AO-366-A46; DA-05-06-A]

Milk in the Appalachian and Southeast Marketing Areas; Order Amending the Orders

AGENCY: Agricultural Marketing Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule amends the transportation credit balancing fund provisions and pooling provisions of the Appalachian and Southeast orders. More than the required number of producers for the Appalachian and Southeast marketing areas approved the issuance of the orders as amended.

EFFECTIVE DATE: May 5, 2013.

FOR FURTHER INFORMATION CONTACT: William G. Francis, Order Formulation and Enforcement Branch, USDA/AMS/Dairy Programs, STOP 0231-Room 2971, 1400

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SUPPLEMENTARY INFORMATION: This final rule amends the transportation credit balancing fund provisions and pooling provisions of the Appalachian and Southeast orders. The transportation credit assessment rate for the Southeast order, adopted on an interim basis in this proceeding (71 FR 62377) was subsequently increased in a separate proceeding (73 FR 14153)¹. Accordingly, increases to the Southeast order transportation credit assessment rate considered in this proceeding are no longer addressed.

Specifically, this decision adopts provisions that:

¹ Official Notice is taken of the subsequent proceeding (73 FR 14153).

1) Establish a variable transportation credit mileage rate factor which uses a fuel cost adjustor in both orders;

2) Increase the Appalachian order's maximum transportation credit assessment rate to \$0.15 per hundredweight (cwt); and

3) Establish a zero diversion limit standard on loads of milk requesting transportation credits.

Executive Orders 12866 and 13563

This administrative rule is governed by the provisions of sections 556 and 557 of Title 5 of the United States Code and, therefore, is excluded from the requirements of Executive Orders 12866 and 13563.

Executive Order 12988

This final rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule is not intended to have retroactive effect. The Agricultural Marketing Agreement Act of 1937, as amended (Act) (7 U.S.C. 601-674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Department of Agriculture (USDA) a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, USDA would rule on the petition. The Act provides that the District Court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review USDA's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

Executive Order 13175

This rule has been reviewed in accordance with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. The review reveals that this rule will not have substantial and direct effects on Tribal Governments and will not have significant Tribal implications.

Regulatory Flexibility Act and Paperwork Reduction Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 - 612), the Agricultural Marketing Service (AMS) has considered the economic impact of this action on small entities and has certified that this rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than \$750,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees.

For the purposes of determining which dairy farms are "small businesses," the \$750,000 per year criterion was used to establish a marketing guideline of 500,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the handler will be considered a large business even if the local plant has fewer than 500 employees.

During January 2006, the time of the hearing, there were 3,055 dairy farms pooled on the Appalachian order (Order 5) and 3,367 dairy farms pooled on the Southeast order (Order 7). Of these, 2,889 dairy farms (95 percent) in Order 5 and 3,218 dairy farms (96 percent) in Order 7 were considered small businesses.

During January 2006, the time of the hearing, there were a total of 37 handlers operating plants associated with the Appalachian order (22 fully regulated plants, 11 partially regulated plants, 2 producer-handlers and 2 exempt plants). A total of 52 plants were associated with the Southeast order (31 fully regulated plants, 9 partially regulated plants and 12 exempt plants). The number of plants meeting the small business criteria under the Appalachian and Southeast orders were 9 (24 percent) and 18 (35 percent), respectively.

The amendments adopted in this rule revise the transportation credit provisions of the Appalachian and Southeast orders. The Appalachian and Southeast orders contain provisions for a transportation credit balancing fund. To partially offset the costs of transporting supplemental milk into each marketing area to meet fluid milk demand at distributing plants during the months of July through December, handlers are charged an assessment year-round to generate revenue used to make payments to qualified handlers.

The adopted amendments establish a variable mileage rate factor that will be adjusted monthly by changes in the price of diesel fuel (a fuel cost adjustor) as reported by the Department of Energy for paying claims from the transportation credit balancing funds of the Appalachian and Southeast orders. Prior to their interim adoption, the mileage rate of both orders was fixed at \$0.35 per cwt per mile.

The adopted amendments increase the transportation credit assessment rate for the Appalachian order. Specifically, the maximum assessment rate for the Appalachian order is increased to \$0.15 per cwt. The transportation credit assessment rate for the Southeast order is increased by actions taken in a separate rulemaking (73 FR 14153). The higher assessment rate is intended to minimize the proration and depletion of the order's transportation credit balancing fund during those months when supplemental milk is needed. The higher assessment rate for the

Appalachian order adopted in this decision is necessary due to expected higher mileage reimbursement rates arising from escalating fuel costs, the transporting of milk over longer distances and the expected continuing need to rely on supplemental milk supplies arising from declining local milk production in the marketing areas.

The transportation credit assessment rate for the Southeast order was increased from \$0.10 per cwt to \$0.20 per cwt on an interim basis (71 FR 62377). Subsequent to this increase, a separate rulemaking affecting the Southeast order proposed an additional increase in the assessment rate to \$0.30 per cwt. A final decision (79 FR 12985), published March 7, 2014, describes the record evidence supporting a \$0.30 per cwt transportation credit assessment rate. The \$0.30 per cwt assessment rate was adopted on an interim basis (73 FR 14153) effective March 18, 2008. Since these separate decisions address the higher assessment rate, there is no further consideration to this issue in this proceeding.

The adopted amendments also amend the Producer milk provisions of the Appalachian and Southeast orders by eliminating the pooling of diverted milk associated with supplemental milk receiving a transportation credit payment. Prior to amendments adopted on an interim basis, the Appalachian and Southeast orders provided transportation credits on supplemental shipments of milk for Class I use provided the milk was from dairy farmers who are not defined as a “producer” under the orders. A producer under the order is defined as a dairy farmer who:

- 1) during the immediately preceding months of March through May and not more than 50 percent of the milk production of the dairy farmer, in aggregate, is received as producer milk by either order during those 3 months; and
- 2) produced milk on a farm not located within the specified marketing areas of either order.

The provisions of each order provide the market

administrator the discretionary authority to adjust the 50 percent milk production standard to assure orderly marketing and efficient handling of milk in the marketing areas.

Adoption of the amendments will be applied to all Appalachian and Southeast order handlers and producers, which consist of both large and small businesses. The adopted amendments will affect all producers and handlers equally regardless of their size. Accordingly, the amendments will not have a significant economic impact on a substantial number of small entities.

A review of reporting requirements was completed under the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35). It was determined that these amendments would have no impact on reporting, recordkeeping, or other compliance requirements because they would remain identical to the current requirements. No new forms are proposed and no additional reporting requirements would be necessary.

E-Government Act

The Agricultural Marketing Service (AMS) is committed to complying with the E-Government Act, to promote the use of the Internet and other information technologies to provide increase opportunities for citizen access to Government information and services, and for other purposes.

Prior documents in this proceeding:

Notice of Hearing: Issued December 22, 2005; published December 28, 2005 (70 FR 76718).

Tentative Partial Decision: Issued September 1, 2006; published September 13, 2006 (71 FR 54118).

Interim Final Rule: Issued October 19, 2006; published October 25, 2006 (71 FR 62377).

Final Partial Decision: Issued February 25, 2014; published March 7, 2014 (79 FR 12985).

Findings and Determinations

The findings and determinations hereinafter set forth supplement those that were made when the Appalachian and Southeast orders were first issued and when they were amended. The previous findings and determinations are hereby ratified and confirmed, except where they may conflict with those set forth herein.

The following findings are hereby made with respect to the Appalachian and Southeast orders:

(a) Findings upon the basis of the hearing record. Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR part 900), a public hearing was held in regard to certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the Appalachian and Southeast marketing areas.

Upon the basis of the evidence introduced at such hearing and the record thereof it is found that:

(1) The Appalachian and Southeast orders, as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(2) The parity prices of milk, as determined pursuant to section 2 of the Act, are not reasonable in view of the price of feed, available supplies of feed, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices

specified in the orders, as hereby amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest; and

(3) The Appalachian and Southeast orders, as hereby amended, regulate the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held.

The amendments to these orders are known to handlers. A final partial decision containing the proposed amendments to these orders was issued on February 25, 2014. An interim final rule adopting these transportation credit balancing fund and diversion limit standards on an interim basis was issued on October 19, 2006, and published on October 25, 2006 (71 FR 62377).

Accordingly, the changes that result from these amendments will not require extensive preparation or substantial alteration in the method of operation for handlers. In view of the foregoing, it is hereby found and determined that good cause exists for making these order amendments effective [insert date 1 day after publication in the **Federal Register**]. It would be contrary to the public interest to delay the effective date of these amendments for 30 days after their publication in the **Federal Register**. (Sec. 553(d), Administrative Procedure Act, 5 U.S.C. 551-559.)

(c) Determinations. It is hereby determined that:

(1) The refusal or failure of handlers (excluding cooperative associations specified in Sec. 8c(9) of the Act) of more than 50 percent of the milk that is marketed within the specified marketing area to sign a proposed marketing agreement tends to prevent the effectuation of the declared policy of the Act;

(2) The issuance of the order amending the Appalachian and Southeast orders is the only practical means pursuant to the declared policy of the Act of advancing the interests of producers as defined in the order as hereby amended;

(3) The issuance of the order amending the Appalachian and Southeast orders is favored by at least two-thirds of the producers who were engaged in the production of milk for sale in the marketing area.

List of Subjects in 7 CFR Parts 1005 and 1007

Milk marketing orders.

Order Relative to Handling

It is therefore ordered, that on and after the effective date hereof, the handling of milk in the Southeast and Appalachian marketing areas shall be in conformity to and in compliance with the terms and conditions of the orders, as amended, and as hereby amended, as follows:

1. The authority citation for 7 CFR parts 1005 and 1007 continues to read as follows:

Authority: 7 U.S.C. 601-674, and 7253

PART 1005 - MILK IN THE APPALACHIAN MARKETING AREA

2. Section 1005.13 is amended by revising paragraphs (d)(3) and (d)(4) to read as follows:

§ 1005.13 Producer milk.

* * * * *

(d) * * *

(3) The total quantity of milk so diverted during the month by a cooperative association shall not exceed 25 percent during the months of July through November, January, and February, and 35 percent during the months of December and March through June, of the producer milk

that the cooperative association caused to be delivered to, and physically received at, pool plants during the month, excluding the total pounds of bulk milk received directly from producers meeting the conditions as described in § 1005.82(c)(2)(ii) and (iii), and for which a transportation credit is requested;

(4) The operator of a pool plant that is not a cooperative association may divert any milk that is not under the control of a cooperative association that diverts milk during the month pursuant to paragraph (d) of this section. The total quantity of milk so diverted during the month shall not exceed 25 percent during the months of July through November, January, and February, and 35 percent during the months of December and March through June, of the producer milk physically received at such plant (or such unit of plants in the case of plants that pool as a unit pursuant to § 1005.7(e)) during the month, excluding the quantity of producer milk received from a handler described in § 1000.9(c) of this chapter and excluding the total pounds of bulk milk received directly from producers meeting the conditions as described in § 1005.82(c)(2)(ii) and (iii), and for which a transportation credit is requested;

* * * * *

3. Section 1005.81 is revised to read as follows:

§ 1005.81 Payments to the transportation credit balancing fund.

(a) On or before the 12th day after the end of the month (except as provided in § 1000.90 of this chapter), each handler operating a pool plant and each handler specified in § 1000.9(c) shall pay to the market administrator a transportation credit balancing fund assessment determined by multiplying the pounds of Class I producer milk assigned pursuant to § 1005.44 by \$0.15 per hundredweight or such lesser amount as the market administrator deems necessary

to maintain a balance in the fund equal to the total transportation credits disbursed during the prior June-February period. In the event that during any month of the June-February period the fund balance is insufficient to cover the amount of credits that are due, the assessment should be based upon the amount of credits that would had been disbursed had the fund balance been sufficient.

(b) The market administrator shall announce publicly on or before the 23rd day of the month (except as provided in § 1000.90) the assessment pursuant to paragraph (a) of this section for the following month.

4. Section 1005.82 is amended by revising paragraphs (d)(2)(ii) and (d)(3)(iv) to read as follows:

§ 1005.82 Payments from the transportation credit balancing fund.

* * * * *

(d) * * *

(2) * * *

(ii) Multiply the number of miles so determined by the mileage rate for the month computed pursuant to § 1005.83(a)(6);

* * * * *

(3) * * *

(iv) Multiply the remaining miles so computed by the mileage rate for the month computed pursuant to § 1005.83(a)(6);

* * * * *

5. Revise § 1005.83 to read as follows:

§ 1005.83 Mileage rate for the transportation credit balancing fund.

(a) The market administrator shall compute a mileage rate each month as follows:

(1) Compute the simple average rounded to three decimal places for the most recent four (4) weeks of the Diesel Price per Gallon as reported by the Energy Information Administration of the United States Department of Energy for the Lower Atlantic and Gulf Coast Districts combined.

(2) From the result in paragraph (a)(1) in this section subtract \$1.42 per gallon;

(3) Divide the result in paragraph (a)(2) of this section by 5.5, and round down to three decimal places to compute the fuel cost adjustment factor;

(4) Add the result in paragraph (a)(3) of this section to \$1.91;

(5) Divide the result in paragraph (a)(4) of this section by 480;

(6) Round the result in paragraph (a)(5) of this section down to five decimal places to compute the mileage rate.

(b) The market administrator shall announce publicly on or before the 23rd day of the month (except as provided in § 1000.90 of this chapter) the mileage rate pursuant to paragraph (a) of this section for the following month.

PART 1007 – MILK IN THE SOUTHEAST MARKETING AREA

6. Section 1007.13 is amended by revising paragraphs (d)(3) and (d)(4) to read as follows:

§ 1007.13 Producer milk.

* * * * *

(d) * * *

(3) The total quantity of milk diverted during the month by a cooperative association shall not exceed 25 percent during the months of July through November, January, and February, and 35 percent during the months of December and March through June, of the producer milk that the cooperative association caused to be delivered to, and physically received at, pool plants during the month, excluding the total pounds of bulk milk received directly from producers meeting the conditions as described in § 1007.82(c)(2)(ii) and (iii), and for which a transportation credit is requested;

(4) The operator of a pool plant that is not a cooperative association may divert any milk that is not under the control of a cooperative association that diverts milk during the month pursuant to paragraph (d) of this section. The total quantity of milk so diverted during the month shall not exceed 25 percent during the months of July through November, January and February, and 35 percent during the months of December and March through June of the producer milk physically received at such plant (or such unit of plants in the case of plants that pool as a unit pursuant to § 1007.7(e)) during the month, excluding the quantity of producer milk received from a handler described in § 1000.9(c) of this chapter, excluding the total pounds of bulk milk received directly from producers meeting the conditions as described in § 1007.82(c)(2)(ii) and (iii), and for which a transportation credit is requested.

* * * * *

7. Section 1007.81 is amended by revising paragraph (b) to read as follows:

§ 1007.81 Payments to the transportation credit balancing fund.

* * * * *

(b) The market administrator shall announce publicly on or before the 23rd day of the month (except as provided in § 1000.90 of this chapter) the assessment pursuant to paragraph (a) of this section for the following month.

8. Section 1007.82 is amended by revising paragraphs (d)(2)(ii) and (d)(3)(iv) to read as follows:

§ 1007.82 Payments from the transportation credit balancing fund.

* * * * *

(d) * * *

(2) * * *

(ii) Multiply the number of miles so determined by the mileage rate for the month computed pursuant to § 1007.83(a)(6);

* * * * *

(3) * * *

(iv) Multiply the remaining miles so computed by the mileage rate for the month computed pursuant to § 1007.83(a)(6);

* * * * *

9. Revise § 1007.83 to read as follows:

§ 1007.83 Mileage rate for the transportation credit balancing fund.

(a) The market administrator shall compute the mileage rate each month as follows:

(1) Compute the simple average rounded to three decimal places for the most recent 4 weeks of the Diesel Price per Gallon as reported by the Energy Information Administration of

the United States Department of Energy for the Lower Atlantic and Gulf Coast Districts combined.

(2) From the result in paragraph (a)(1) in this section subtract \$1.42 per gallon;

(3) Divide the result in paragraph (a)(2) of this section by 5.5, and round down to three decimal places to compute the fuel cost adjustment factor;

(4) Add the result in paragraph (a)(3) of this section to \$1.91;

(5) Divide the result in paragraph (a)(4) of this section by 480;

(6) Round the result in paragraph (a)(5) of this section down to five decimal places to compute the mileage rate.

(b) The market administrator shall announce publicly on or before the 23rd day of the month (except as provided in § 1000.90 of this chapter) the mileage rate pursuant to paragraph (a) of this section for the following month.

Dated: April 28, 2014.

Rex A. Barnes,

Associate Administrator,

Agricultural Marketing Service.

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